

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
FORT WORTH DIVISION**

**BETH CHANEY MACNEILL**  
*Plaintiff*

VS.

**NIRMAL JAYASEELAN, M.D., DOMINGO  
K. TAN, M.D., CHAD CARLTON, M.D.,  
TEXAS HEALTH HARRIS METHODIST  
HOSPITAL FORT WORTH, EMERGENCY  
MEDICINE CONSULTANTS LTD.,  
BAYLOR ALL SAINTS MEDICAL CENTER  
AT FORT WORTH AND EMCARE, INC.**

*Defendants*

**CIVIL ACTION NO. 4-14CV-242-0**

**PLAINTIFF'S MOTION TO COMPEL DISCOVERY FROM NIRMAL JAYASEELAN,  
M.D. AND BRIEF IN SUPPORT THEREOF**

**Robert W. Hammer**  
State Bar No. 08854780  
675 North Henderson, Suite 300  
Fort Worth, Texas 76107  
[Robert@rhammerlaw.com](mailto:Robert@rhammerlaw.com)  
Telephone 817/ 332-8266  
Telefax 817/ 332-8708

**Michael J. Henry**  
State Bar No. 09482300  
675 North Henderson, Suite 300  
Fort Worth, Texas 76107  
[henry@henrytexlaw.com](mailto:henry@henrytexlaw.com)  
Telephone 817/ 877-3303  
Telefax 817/ 338-9109

**ATTORNEYS FOR PLAINTIFF**

## **Table of Contents**

Table of Contents	ii
Table of Authorities	iii
I. Introduction	1
II. Relevant Procedural Background	2
III. Defendant Jayaseelan has the legal right to obtain the "call" policies on demand or has the practical ability to obtain the "call" policies from a non-party to the action.	2
IV. Conclusion	4

## Table of Authorities

### U.S. Court of Appeals

*McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1484 (5th Cir. 1990). ..... 3

### U.S. District Court

*Enron Corp. Sav. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149 (S.D. Tex. 2009)..... 3

*Estate of Monroe v. Bottle Rock Power Corp.*, No. 03-2682, 2004 U.S. Dist. LEXIS 5737, at \*10  
(E.D. La. April 2, 2004)..... 3

*Southern Filter Media, LLC v. Halter*, No. 13-116-JJB-RLB, 2014 U.S. Dist. LEXIS 120837  
(M.D. La. Aug. 29, 2014). ..... 2

*United States ex rel. Stewart v. La. Clinic*, No. 99-1767 Section "N"(3), 2003 U.S. Dist. LEXIS  
9401 (E.D. La. June 4, 2003). ..... 3

### Federal Rules

*Fed. R. Civ. P. 34*..... 3

*Fed. R. Civ. P. 26*..... 2

### Appendix

App. 1 at p.1..... 2



physician, John Winter, M.D., was a general surgeon and not a bariatric surgeon. Additionally, Dr. Winter did not have privileges at Forest Park. Baylor All Saints Medical Center kept Plaintiff overnight until she could be transferred back to Dr. Jayaseelan and Forest Park where she underwent surgical repair of the stomach perforation. Plaintiff's condition materially deteriorated while she waited to be transferred to Dr. Jayaseelan at Forest Park Medical Center.

## **II. Relevant Procedural Background**

On April 8, 2014, Plaintiff filed her Original Complaint asserting that, *inter alia*, Defendant Nirmal Jayaseelan, M.D. had been negligent in his care and treatment of Beth MacNeill. Defendant Jayaseelan filed his Original Answer on May 7, 2014. Plaintiff served her Requests for Production on Defendant Jayaseelan on August 8, 2014. Defendant Jayaseelan served his Objections and Responses to Plaintiff's Request for Production on September 5, 2014.

Defendant Jayaseelan refuses to produce the "call" policies at Forest Park Medical Center and Dallas Bariatric Center on the basis that the policies are not in Defendant Jayaseelan's possession. App. 1 at p.1. Plaintiff asserts that Defendant Jayaseelan has the legal right to obtain the "call" policies on demand or has the practical ability to obtain the "call" policies from a non-party to the action and therefore must produce these documents.

Good cause exists to compel Defendant Jayaseelan to produce documents in response to Plaintiff's Requests for Production.

## **III. Defendant Jayaseelan has the legal right to obtain the "call" policies on demand or has the practical ability to obtain the "call" policies from a non-party to the action.**

The scope of discovery in federal court is set forth in *Federal Rule of Civil Procedure 26(b)(1)*. *Rule 26(b)(1)* allows a party to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." *Southern Filter Media, LLC v. Halter*, No. 13-116-JJB-RLB, 2014 U.S. Dist. LEXIS 120837 (M.D. La. Aug. 29, 2014). A relevant discovery

request seeks information that is "either admissible or reasonably calculated to lead to the discovery of admissible evidence." *McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1484 (5th Cir. 1990). The "call" policies at Forest Park Medical Center and Dallas Bariatric Center are relevant to the issue regarding the transfer and the delay in surgically repairing Beth MacNeill's stomach perforation.

*Rule 34 of the Federal Rules of Civil Procedure* provides for the discovery of documents and tangible items. *Rule 34(a)*, states that "any party may serve on any other party a request (1) to produce . . . any designated documents . . . which are in the possession, *custody or control* of the party upon whom the request is served." *Fed. R. Civ. P. Rule 34(a)* (emphasis added). Federal courts have consistently held that documents are deemed to be within the "possession, custody or control" of a party for purposes of *Rule 34* if the party has actual possession, custody or control, or has the legal right to obtain the documents on demand or has the practical ability to obtain the documents from a non-party to the action. *Enron Corp. Sav. Plan v. Hewitt Assocs., L.L.C.*, 258 F.R.D. 149 (S.D. Tex. 2009); *United States ex rel. Stewart v. La. Clinic*, No. 99-1767 Section "N"(3), 2003 U.S. Dist. LEXIS 9401 (E.D. La. June 4, 2003).

*Rule 34* is broadly construed and documents within a party's control are subject to discovery, even if owned by a nonparty. *Estate of Monroe v. Bottle Rock Power Corp.*, No. 03-2682, 2004 U.S. Dist. LEXIS 5737, at \*10 (E.D. La. April 2, 2004). Typically what must be shown is a relationship, either because of some affiliation, employment or statute, such that a party is able to command release of certain documents by the non-party person or entity in actual possession. *United States ex rel. Stewart*, 2003 U.S. Dist. LEXIS 9401 at \*37. The applicable test is whether the litigant has the ability to obtain the documents on request to a related party, either as a matter of law or as a matter of practical fact. *Id.*

Defendant Jayaseelan has surgical privileges at Forest Park Medical Center. As a member of the medical staff, Dr. Jayaseelan is required to follow Hospital/Medical Staff By-Laws, Policies and Procedures. Forest Park Medical Center has a "call" policy and Dr. Jayaseelan is obligated to follow that policy. Similarly, Dr. Jayaseelan is a principal, shareholder, or employee of Dallas Bariatric Center. As such, Dr. Jayaseelan is required to follow Dallas Bariatric Center's By-Laws, Policies and Procedures regarding "call". Dr. Jayaseelan has the requisite relationship with these facilities to obtain the documents on demand or has the practical ability to obtain the documents from a non-party to the action.

#### **IV. Conclusion**

Defendant Jayaseelan has a legal right to obtain possession of the "call" policies from Forest Park Medical Center and Dallas Bariatric Center and therefore should produce these documents. Simply asserting that Dr. Jayaseelan is not in possession of the documents requested is an inadequate response.

Respectfully Submitted,

By /s/ Robert Hammer  
**Robert W. Hammer**  
State Bar No.: 08854780

**Michael J. Henry**  
State Bar. No.: 09482300

**ROBERT W. HAMMER**  
675 North Henderson, Suite 300  
Fort Worth, Texas 76107  
robert@rhammerlaw.com  
Telephone 817/ 332-8266

Telefax 817/ 332-8708

AND

**MICHAEL J. HENRY P.C.**  
675 North Henderson, Suite 300  
Fort Worth, Texas 76107  
[henry@henrytexlaw.com](mailto:henry@henrytexlaw.com)  
Telephone 817/ 877-3303  
Telefax 817/ 338-9109

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF CONFERENCE**

I certify that on September 18, 2014, I conferred with Jarad Kent regarding Plaintiff's Motion to Compel Discovery from Nirmal Jayaseelan, M.D. I was informed that Defendant stands on his Answers. Therefore, an agreement could not be reached and this Motion is submitted for the Court's consideration.

By /s/ Robert Hammer  
**Robert W. Hammer**



**CERTIFICATE OF SERVICE**

I hereby certify that on October 2, 2014 I electronically filed the foregoing with the Clerk for the U.S. District Court, Northern District of Texas, using the ECF system which will send notification of such filing to the following counsel of record:

Russell G. Thornton  
THIEBAUD REMINGTON THORNTON BAILEY, L.L.P.  
1445 Ross Avenue, Suite 4800  
Dallas, Texas 75202  
[rthornton@trtblaw.com](mailto:rthornton@trtblaw.com)  
[bmiciotto@trtblaw.com](mailto:bmiciotto@trtblaw.com)

Julie A. Mederos  
MEDEROS ATTORNEYS  
17950 Preston Road, Suite 990  
Dallas, Texas 75252  
[jmederos@mederosattorneys.com](mailto:jmederos@mederosattorneys.com)  
[firm@mederosattorneys.com](mailto:firm@mederosattorneys.com)  
[kmcquilliams@mederosattorneys.com](mailto:kmcquilliams@mederosattorneys.com)  
[skim@mederosattorneys.com](mailto:skim@mederosattorneys.com)

Gregory P. Blaies  
James W. Hryekewicz  
BLAIES & HIGHTOWER  
421 W. Third Street, Suite 900  
Fort Worth, Texas 76102  
[lindaroeder@bhilaw.com](mailto:lindaroeder@bhilaw.com)  
[lynnboyk@bhilaw.com](mailto:lynnboyk@bhilaw.com)  
[gregblaies@bhilaw.com](mailto:gregblaies@bhilaw.com)  
[jwh@bhilaw.com](mailto:jwh@bhilaw.com)

Jeffrey W. Ryan  
Jarad Lee Kent  
CHAMBLEE & RYAN P.C.  
2777 N. Stemmons Frwy., Suite 1157  
Dallas, Texas 75207  
[jwryanj@chambleeryan.com](mailto:jwryanj@chambleeryan.com)  
[jkent@chambleeryan.com](mailto:jkent@chambleeryan.com)  
[jarad.kent@gmail.com](mailto:jarad.kent@gmail.com)  
[bgreen@chambleeryan.com](mailto:bgreen@chambleeryan.com)

Vernon L. Krueger  
KRUEGER, BELL & BAILEY  
1701 Market Street, Suite 318, LB 18  
Dallas, Texas 75202  
[Vernon@kbbllp.com](mailto:Vernon@kbbllp.com)  
[ann@kbbllp.com](mailto:ann@kbbllp.com)  
[landon@kbbllp.com](mailto:landon@kbbllp.com)

Randy J. Hall  
DECKER, JONES, MCMACKIN, MCCLANE, HALL & BATES  
Burnett Plaza, Unit 46  
801 Cherry Street, Suite 2000  
Fort Worth, Texas 76102  
[rhall@deckerjones.com](mailto:rhall@deckerjones.com)  
[pmaurice@deckerjones.com](mailto:pmaurice@deckerjones.com)

/s/Robert Hammer  
**Robert W. Hammer**

